



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OFFICE OF THE CHAIRMAN

February 18, 1993

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

SUBJECT: Draft AO 1993-2

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for February 25, 1993.

Attachment

AGENDA ITEM
For Meeting of: FEB 25 1993

1
2
3 **ADVISORY OPINION 1993-2**

DRAFT

4 **Robert F. Bauer**
5 **Perkins Coie**
6 **607 Fourteenth Street, N.W.**
7 **Washington, D.C. 20005-2011**

8 **Dear Mr. Bauer:**

9 This responds to your letter dated January 29, 1993,
10 requesting an advisory opinion on behalf of the Democratic
11 Senatorial Campaign Committee ("the DSCC") concerning the
12 application of the Federal Election Campaign Act of 1971, as
13 amended ("the Act"), and Commission regulations to the
14 application of party coordinated expenditure limits to a
15 special Senatorial election together with any run-off.

16 After Senator Lloyd Bentsen's nomination as Secretary of
17 the Treasury in December 1992, the Governor of Texas
18 appointed an individual as an interim Senator until a special
19 election is held. Candidates from all parties, including any
20 independents, will compete in this election. Under Texas
21 law, if no candidate receives a majority of votes in the
22 special election, a run-off between the top two finishers
23 will occur to determine who will hold the seat. See Election
24 Code §§ 2.021, 2.023, 203.003, and 204.005. The winner will
25 serve out the balance of Senator Bentsen's term, which
26 expires in January 1995. The special election has been
27 scheduled for May 1, 1993.

28 The DSCC, as agent for the State Democratic Committee of
29 Texas and the Democratic National Committee, will make
30 coordinated expenditures in connection with the impending

3
4 Texas Senate race pursuant to 2 U.S.C. §441a(d)(3). In view
5 of the possibility that there will be a run-off, you ask
6 whether, under section 441a(d), there is a single expenditure
7 limitation on parties supporting candidates in a special
8 election or, in the alternative, a separate limit for a
9 run-off.

10 The Act and regulations provide that political party
11 committees may make limited expenditures in connection with
12 the general election campaign of candidates for Federal
13 office. 2 U.S.C. §441a(d)(1); 11 CFR 110.7(b)(1). The
14 national party committee (including any designated agent of
15 the national committee) and state political party committee
16 (including subordinate state committees) may each make
17 expenditures in connection with the general election campaign
18 of a Senatorial candidate in that state who is affiliated
19 with such party. 2 U.S.C. §441a(d)(3); 11 CFR 110.7(b)(1)
20 and 110.7(a)(4). These two limits (one for the national and
21 one for the state) are set by a formula contained in the Act
22 based on voting age population of the state. 2 U.S.C.
23 §441a(d)(3)(A) and 441a(c); 11 CFR 110.7(b)(2)(i) and (c),
24 and 110.9(c).

25 The Act defines "election" to include a general
26 election, but does not separately define the term "general
27 election." See 2 U.S.C. §431(1). Commission regulations,
28 however, define "general election" to include an election
29 which is held to fill a vacancy in a Federal office and which
30 is intended to result in the final selection of a single

3 individual to the office at stake. 11 CFR 100.2(b)(2). The
4 regulations also provide that a special election is held to
5 fill a vacancy and may be a primary, general, or run-off
6 election.

7 The Commission has previously addressed the question of
8 whether a run-off following a special general election would
9 be considered a separate general election or a continuation
10 of the general election for the purposes of 2 U.S.C.
11 §441a(d). Advisory Opinion 1983-16. In that situation, the
12 State of California held a "special primary" to fill a
13 vacancy for a House seat. Under California law, all
14 candidates of whatever affiliation ran against each other.
15 If any candidate received a majority, he or she was declared
16 the winner. If no candidate received a majority, a
17 subsequent election was held and the candidates were limited
18 to the top vote getter in each "political party or political
19 body." The Commission determined that the first election,
20 although it was labeled a "special primary" and could be
21 followed by a run-off, fit the definition of "general
22 election" because it was held to fill a vacancy in a Federal
23 office (i.e., a special election) and was intended to result
24 in a final selection of a single individual. 11 CFR
25 100.2(b)(2). The Commission noted that this was consistent
26 with a conclusion of a California appellate court in a 1978
27 decision.

28 The Commission also concluded that, in view of the
29 circumstances of the special election process in California,
30

3
4 the run-off could be viewed as a continuation of the general
5 election campaign which began in connection with the first
6 election.^{1/} The Commission further stated, however, that the
7 run-off was not a separate or additional general election
8 allowing for a new §441a(d) limit, and that only a single set
9 of §441a(d) limits was allowable. The Commission noted that,
10 under Commission regulations, an election is classified
11 according to one type only. See 11 CFR 100.2. With respect
12 to special elections, no provision is made for characterizing
13 the same election as both a general and a run-off election.
14 See 11 CFR 100.2(f). Thus, only one section 441a(d) limit
15 was available, but it could be utilized for both the first
and second elections, i.e., the general and the run-off.

The Commission concludes that there is no practical
difference between the situation presented in Advisory
Opinion 1983-16 and the situation presented in Texas. Thus,
there will be one section 441a(d) limitation applicable to
the special election together with any run-off. The special
election scheduled for May 1 is a general election under 11
CFR 100.2(b)(2), i.e., it is being held to fill a vacancy in
a Federal office and is intended to result in the final
selection of a single individual to the office. The possible
run-off election fits the definition distinguishing run-offs
from general elections, i.e., "[t]he election held after a

28 ^{1/} The most significant circumstance was that, although
29 there was a possibility that the first election would select
30 an officeholder, there remained the possibility that a
subsequent election would be needed.

3 general election and prescribed by applicable State law as
4 the means for deciding which candidate should be certified as
5 officeholder elect." 11 CFR 100.2(d)(2).

6 As noted in Advisory Opinion 1983-16, this conclusion
7 does not change the status of the run-off election as a
8 separate election for the purposes of the contribution limits
9 in 2 U.S.C. §441a(a). These limits apply with respect to
10 "any election" or "each election," and do not relate
11 specifically to the determination of what constitutes a
12 general election or a "general election campaign" for the
13 purposes of section 441a(d). Compare 2 U.S.C. §441a(a)(1),
14 (2), and (6), to 2 U.S.C. §441a(d).

15 The legislative history of the Act further supports the
16 separate treatment and interpretation given to contribution
17 limits under 2 U.S.C. §441a(a) and coordinated expenditure
18 limits under 2 U.S.C. §441a(d). The Conference report for
19 the 1976 amendments explains section 441a(d) as follows:

20 This limited permission allows the political
21 parties to make contributions in kind by spending
22 money for certain functions to aid the individual
23 candidates who represent the party during the
24 election process. Thus, but for this subsection,
these expenditures would be covered by the
contribution limitations stated in subsections
(a)(1) [section 441a(a)(1)] and (a)(2) [441a(a)(2)]
of this provision.

25 H.R. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976). This
26 explanation separates the limited permission of party
27 expenditures in 2 U.S.C. §441a(d) from the contribution
28 limitations of 2 U.S.C. §441a(a). Furthermore, it indicates
29 that section 441a(d), unlike section 441a(a), addresses the
30

3 election process, rather than specific selection points
4 within the process. See 11 CFR 110.1(b)(2), (b)(3)(i), and
5 (j)(1); 110.2(b)(2), (b)(3)(i), and (i)(1). The election
6 process always has a single general election and the process
7 may entail other elections either before or after the general
8 election; e.g., nominating convention, popular primary,
9 post-primary or post-general run-offs. All of these are
10 focused on the general election, either as a means to narrow
11 the field before the general election, or afterwards, if the
12 general election is inconclusive.

13 This response constitutes an advisory opinion concerning
14 application of the Act, or regulations prescribed by the
15 Commission, to the specific transaction or activity set forth
in your request. See 2 U.S.C. §437f.

17 Sincerely,

18
19 Scott E. Thomas
20 Chairman

21 Enclosure (AO 1983-16)
22
23
24
25
26
27
28
29
30